Cobb Mechanical Contractors, Inc. *and* United Association of Plumbers and Pipefitters, Local Union No. 196, AFL–CIO. Case 16–CA–16483

May 26, 2004

SUPPLEMENTAL DECISION AND ORDER

BY CHAIRMAN BATTISTA AND MEMBERS SCHAUMBER AND WALSH

I. THE ISSUES

This case is before the Board on remand from the United States Court of Appeals for the District of Columbia Circuit. *Cobb Mechanical Contractors, Inc. v. NLRB*, 295 F.3d 1370 (D.C. Cir. 2002). Specifically, the court remanded the case to the Board for consideration of the following two issues: First, has Cobb Mechanical Contractors, Inc. (the Respondent or Cobb) established that it had a longstanding policy of not hiring a journeyman plumber for a plumber's helper position? Second, has the Respondent satisfied its burden of showing that only two union applicants would have transferred to a new Cobb project after the completion of the projects in issue? For the reasons set forth below, we answer the first question in the affirmative and the second question in the negative.

II. PROCEDURAL HISTORY

On April 26, 1995, Administrative Law Judge Frederick C. Herzog issued a decision in which he found that the Respondent violated Section 8(a)(3) and (1) of the National Labor Relations Act by failing since November 1, 1993, to hire union applicants for jobs as plumbers, plumbers' helpers, and pipefitters at jobsites in Amarillo and Dalhart, Texas.[1] The Respondent failed to file timely exceptions. On June 23, 1995, the Board entered an Order adopting Judge Herzog's decision and recommended Order. On June 6, 1996, the United States Court of Appeals for the Fifth Circuit entered a judgment enforcing the Board's Order.[2]

The General Counsel and Respondent were unable to agree on the amount of backpay due under the Board's Order. On June 20, 1997, the Regional Director for Region 16 issued a compliance specification and notice of hearing setting forth a formula to determine the amount of backpay that each discriminatee was entitled to receive.

On May 13, 1998, Administrative Law Judge Keltner W. Locke issued a supplemental decision finding, inter alia, that 19 discriminatees were entitled to backpay. On April 30, 2001, the Board issued a Decision and Order in which it affirmed Judge Locke's rulings, findings, and conclusions and adopted his recommended Order in all material respects. 333 NLRB 1168.

Thereafter, the Respondent filed a petition for review with the Court of Appeals for the District of Columbia Circuit, and the Board filed a cross-petition for enforcement of its Order. On July 23, 2002, the court granted the Board's cross-application for enforcement, except for the two issues listed above which the court remanded to the Board for reconsideration consistent with the court's opinion. 295 F.3d at 1378–1379.

On November 22, 2002, the Board advised the parties that it had accepted the court's remand and invited them to file statements of position with respect to the issues raised by the remand. The General Counsel, the Charging Party, and the Respondent all filed position statements.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

III. DISCUSSION OF THE TWO ISSUES REMANDED BY THE COURT

A. Cobb Has Shown An Established Policy of Not Hiring Journeymen Plumbers for Plumbers' Helpers Positions

The General Counsel's backpay formula is based on the assumption that, absent the unlawful refusal to hire, Cobb would have hired persons qualified as plumbers to fill positions as plumbers' helpers. See *Cobb Mechanical*, 333 NLRB at 1175–1176. In other words, in determining when the backpay period began for any given plumber discriminatee, the compliance specification assumes that the discriminatee would have been hired whenever Cobb hired either a plumber or a plumber's helper.

Before Judge Locke, Cobb argued that this assumption was unwarranted. Cobb supported its position with the uncontradicted testimony of two Cobb officials that Cobb had a longstanding policy of not hiring plumbers as plumbers' helpers in order to prevent overqualified plumbers from leaving helper positions as soon as they were offered higher paying plumber positions elsewhere. 333 NLRB at 1176. Judge Locke concluded, however, that Cobb's argument seemed "disingenuous" because, in light of Cobb's antiunion animus, it would welcome the turnover of union employees. 333 NLRB at 1176–1177.

[1] *Cobb Mechanical Contractors, Inc.*, JD(SF)–45–95.

[2] *NLRB v. Cobb Mechanical Contractors, Inc.*, 91 F.3d 139 (5th Cir.1996) (table).

The court was not satisfied with Judge Locke's reason for discounting Cobb's evidence. The court stated that, in computing the backpay due, Judge Locke "had to determine when the union applicants would have been hired had Cobb no antiunion animus. We remand this issue to the Board to reconsider Cobb's argument." 295 F.3d at 1378–1379.

Having accepted the court's remand, we also accept its opinion as the law of the case. We, therefore, recognize that, guided by the court's analysis, we must carefully scrutinize the record to determine whether Cobb had an established policy against hiring plumbers as plumbers' helpers.

Initially, we note that the court specifically characterized Cobb's argument that the plumber discriminatees would not have been hired for helper jobs as one that "*has merit*." 295 F.3d at 1378. The court stated that there was testimony in the record of "[s]everal Cobb officials" supporting Cobb's position that the hiring policy was "long standing" and legitimately designed to prevent high turnover on jobs. Id.

Contrary to our dissenting colleague, we find, based on the uncontradicted testimony of two high-level management officials, Controller Paula McKinney and Vice President for Operations Jerry Bitner, that Cobb did have a policy of not hiring plumbers as plumbers' helpers.

McKinney testified that she reviewed all the personnel records for persons hired as plumbers' helpers by Cobb at the Amarillo and Dalhart jobsites where the unfair labor practices occurred and she found no instances where Cobb hired a qualified journeyman plumber to work as a plumber's helper.

Bitner's testimony is fully consistent with McKinney's. Bitner testified that Cobb has a strict policy against hiring journeymen for plumbers' helpers positions. The reason for the policy, Bitner explained, was that an overqualified journeyman hired into a helper position would leave the Company in the lurch as soon as he was offered a higher paying journeyman job elsewhere.[3]

The testimony of McKinney and Bitner was not controverted or discredited, and we concur with the court in its ruling that Judge Locke erred in discounting it. We add that common experience tells us that such a policy—not hiring a person overqualified for the position—is not unusual.

Our dissenting colleague, like Judge Locke, discounts McKinney and Bitner's testimony as entitled to "little weight." His reasoning is unpersuasive. The fact that McKinney was hired after the Amarillo and Dalhart projects does not detract from the accuracy of her review of the Respondent's employment records. Similarly, the fact that Bitner is not routinely involved in hiring and that the policy of not hiring plumbers as plumber helpers was not in writing are red herrings. Bitner was vice president of operations called for his knowledge of company employment policy. The existence of a policy not to hire any experienced tradesmen to fill the position of helpers is not made less likely because it was not reduced to writing.

Accordingly, having carefully reconsidered the record, we find, consistent with the terms of the court's remand and in accord with it, that the McKinney and Bitner testimony establishes that the plumber discriminatees would not have been hired on the dates that plumbers' helpers were hired because of Cobb's policy of not hiring plumbers to be plumbers' helpers.[4]

In reaching the opposite conclusion, our dissenting colleague relies on the language in a form letter Cobb sent to some of the discriminatees in response to Judge Herzog's decision as it was enforced by the Fifth Circuit. Consideration of the form in this context reveals that the dissent's reliance on the letter is very much misplaced.

The letter in question, dated August 15, 1996, stated as follows:

> By this letter, Cobb Mechanical Contractors offers you reinstatement to either the position of Plumber or Plumber helper, depending on availability, to a Cobb jobsite in the state of Colorado. Please fill out the enclosed form and return it as soon as possible in the enclosed postage paid envelope.

[3] The dissent faults the Respondent for not putting its hiring policy in writing. However, Board law does not require that a company's hiring policies be in writing. See, e.g., *Hartman Bros. Heating & Air Conditioning*, 332 NLRB 1343, 1344 fn. 9 (2000) (complaint allegation that respondent unlawfully refused to hire union applicant with 26 years' experience dismissed based on judge's crediting of respondent's testimony that it preferred inexperienced applicants who were easier to train), enfd. 280 F.3d 1110 (7th Cir. 2002).

[4] Given the complete failure of the General Counsel to controvert the testimony of the Respondent's witnesses, there is no merit in the dissent's contention that the Respondent should have called yet another high-level official to corroborate McKinney and Bitner.

Equally specious is the dissent's thesis that the McKinney and Bittner testimony is entitled to "little weight." If the court of appeals were of that view, it would have never remanded the case to the Board.

The contention that we have misapplied the burdens of proof and Board precedent also rings hollow. The Respondent's burden is only to prove its defense by "the usual standard in civil cases—a preponderance of the evidence. A 'preponderance' of evidence means evidence sufficient to permit the conclusion that the proposed finding is more probable than not." *Diamond Walnut Growers Inc*., 340 NLRB No. 135, slip op. at 4 (2003). We believe that the testimony of McKinney and Bitner, which the court cited favorably in its opinion, 295 F.3d at 1378, shows that it is more likely than not that Cobb maintained a policy of not hiring plumbers to be plumbers' helpers.

At the top of a form enclosed with the letter were boxes labeled "Accept" and "Decline." At the bottom of the form were lines for signature and date. The body of the form stated as follows:

> I, _____ [accept/decline] Reinstatement to the position of Plumber or Plumber helper, depending on availability, at a Cobb Mechanical Contractor's jobsite in the state of Colorado. I am available to report to work on _____. I can be reached to discuss job assignments at _____. My current mailing address is _____.

Our dissenting colleague argues that this letter undermines or undercuts the existence of a Cobb policy of not hiring plumbers as plumbers' helpers. Concededly, the letter does appear, on its face, to be making an offer inconsistent with Cobb's policy because it offers the discriminatees, who were plumbers, employment as either plumbers or plumbers' helpers.

However, the letter cannot be considered divorced from the reason for which it was sent. Most significantly, the letter is dated *after* the Respondent failed to file timely exceptions to Judge Herzog's decision *and* the Board issued an Order adopting Judge Herzog's decision and recommended Order, and *after* the Fifth Circuit enforced the Board's Order.

The relevant chronology is as follows. On April 26, 1995, Judge Herzog issued his decision, finding that the Respondent discriminated against the union applicants with respect to both plumber positions and plumbers' helpers positions. As a remedy, Judge Herzog ordered the Respondent to offer the discriminatees "employment in positions for which they applied." On June 23, 1995, the Board issued an Order adopting Judge Herzog's decision and recommended Order. On June 6, 1996, the Fifth Circuit enforced the Board Order.

Thus, as of June 6, 1996, the Respondent had no realistic avenue for appeal, and its backpay liability continued to run. Given its loss in the Fifth Circuit, the Respondent had no choice but to comply with Judge Herzog's recommended Order. And Judge Herzog's recommended Order can reasonably be read as requiring the Respondent to offer the union applicants employment in *both* plumber and plumbers' helpers positions because, as stated above, Judge Herzog found that the Respondent discriminated against the union applicants with respect to both positions.

When the Respondent's August 15, 1996 form letter is viewed in this context, it is readily understandable why Respondent offered the discriminatees "reinstatement to either the position of Plumber or Plumber helper": it was responding to a court-enforced Board order. That is, the court had enforced the Board order to offer the discriminatees employment "in positions for which they applied." The judge, whose decision was upheld by the Board and court, found that the Respondent had discriminated against the applicants with respect to both positions. Thus, the Respondent, on pain of possible contempt, had no choice but to offer employment in both positions. Consequently, this letter has no bearing on the question before us of whether years earlier, when the Respondent was hiring for the Amarillo and Dalhart projects, it had a policy of not hiring plumbers to be plumbers' helpers.

In sum, the letters were responsive to the court decree. They were not an admission that there was no policy against hiring plumbers for helper positions.

Our dissenting colleague argues that the foregoing point has not been made by the Respondent and is therefore not properly before the Board. Assuming arguendo that the Respondent has not made the precise contention, we nonetheless believe that we, as a responsible Agency and as officers of the court, must be responsive to the court's remand order. The court has required us to determine whether the Respondent had a policy of not hiring plumbers for plumber helper positions. An argument against this policy is based on the Respondent's letters of August 15. Thus, in order to properly respond to the remand, we must deal with that issue. We have done so.[5]

To summarize, Judge Locke found that Cobb did not have a policy against hiring plumbers as plumbers' helpers, and he concluded that 19 union applicants were entitled to backpay as plumbers or plumbers' helpers. After carefully reconsidering the record on remand from the D.C. Circuit, however, we conclude that Cobb established by uncontradicted testimony that it maintained a policy against hiring plumbers as plumbers' helpers. Therefore, the only positions the union plumber applicants would have been hired for were plumber positions. The General Counsel's formula for computing backpay, adopted by the Board in its 2001 decision, results in compensating the discriminatees for employment for

[5] Citing *Avne Systems*, 331 NLRB 1352, 1354 (2000), the dissent claims that we have erred by relying on an argument not made by the Respondent itself. However, *Avne Systems* is inapposite. In that case, the Board majority refused to consider arguments made by a dissenting Board Member that were not made by the respondent in the exceptions it filed to the judge's decision. Here, by contrast, we are not considering exceptions to a judge's decision, but a remand by a United States Court of Appeals. The court remanded the case precisely because of the failure of the Board's initial decision to consider all the Respondent's contentions and evaluate all the record evidence. Under these unusual circumstances, we are unwilling to close our eyes to the undisputed facts in the record that plainly reveal the true purpose of the August 15, 1996 letters.

which they were not eligible (the plumbers' helpers positions).

In the underlying proceeding, Judge Herzog found that since November 8, 1993, Cobb hired 13 plumbers for the Amarillo and Dalhart projects.[6] Thus, there were only 13 positions available for the discriminatees, and only 13 discriminatees are entitled to a remedy. The Board's prior backpay award must be modified accordingly. This modification necessarily entails determining which 13 discriminatees are entitled to backpay and possibly recomputing the individual amounts they are due. We therefore shall remand the case to the Regional Director to prepare an amended compliance specification.

B. Cobb Has Not Shown That Only Two Discriminatees Would Have Transferred to New Projects

In determining the correct end date of the backpay periods, Judge Locke applied the *Dean General Contractors*[7] rebuttable presumption that an unlawfully discharged employee in the construction industry would have been transferred to a new project on the termination of the project for which he had been employed initially. Applying that presumption, he determined that Cobb had "not met its burden of proving that the discriminatees would not have been transferred to its other jobs." 333 NLRB at 1174.

Citing *Tualatin Electric, Inc. v. NLRB*,[8] the court of appeals also "recognized that the employer has the burden to rebut the presumption that an employee will be transferred to another project." 295 F.3d at 1379. However, the court faulted Judge Locke for "failing to consider [Cobb's] evidence that only two newly-hired journeymen plumbers and pipefitters at the Amarillo and Dalhart sites transferred to other projects." Id. The court concluded that Judge Locke's failure to address Cobb's evidence "merits remand for the Board to reconsider which, if any, of the union applicants would have transferred to a new Cobb project." Id.

Under the terms of the court's remand, the *Dean General* rebuttable presumption is the law of the case.[9] Therefore, we must find that the discriminatees would have transferred to other Cobb jobs on the completion of the Amarillo and Dalhart projects unless Cobb has rebutted the presumption.

At the hearing before Judge Locke, Cobb produced evidence establishing that only two newly-hired employees were, in fact, transferred to new jobs on completion of the Amarillo and Dalhart projects. The record also shows that seven of Cobb's newly-hired employees on the Amarillo and Dalhart jobsites were discharged for cause and another five voluntarily quit. In compliance with the court's remand, we will now address the question of whether that evidence is sufficient to rebut the presumption.

Cobb asserts that "each individual discriminatee [should be] compared to the corresponding newly hired journeyman plumber." Cobb thus argues essentially that the Board should infer that the discriminatees would have followed the same employment patterns as the new hires and that only two of them would have transferred. Cobb's argument is unconvincing in that it would require the Board to infer that seven discriminatees would have been discharged for cause (because seven new hires were discharged for cause) and that five discriminatees would have quit (because five new hires quit). Without more evidence of employment patterns at Cobb, we are unable to do so. In addition, the Board does not draw "negative inferences" against discriminatees in these kinds of situations. See *Fugazy Continental Corp.*, 276 NLRB 1334, 1343 (1985). Thus, if presented with a choice between an inference that a discriminatee would have been discharged for cause or an inference that the discriminatee would have successfully performed his job, the Board chooses the latter inference. See *Minette Mills, Inc.*, 316 NLRB 1009, 1011 (1995) ("any ambiguities, doubts, or uncertainties are resolved against . . . the wrongdoer, because an offending respondent is not allowed to profit from any uncertainty caused by its discrimination"). Because under *Fugazy Continental* and *Minette Mills* we will not infer that the discriminatees would have followed the largely unsuccessful employment patterns of the new hires, Cobb's evidence that only two new hires were transferred is insufficient to rebut the *Dean General* presumption.

There is an additional reason why Cobb's evidence concerning the two transferees falls short of meeting Cobb's burden to rebut the *Dean General* presumption: other evidence in the record reinforces the presumption. Specifically, Vice President Bitner testified that in staffing a new project, Cobb would give preference to a current employee rather than hire locally. He explained: "Well, obviously, they would already be on my payroll, so I wouldn't have to incur the hiring costs. If he's still employed with us, that means he's—knows what he's doing and has a decent track record and is reliable and dependable." 333 NLRB at 1174.

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[6] JD(SF)–45–95, slip op. at p. 4, fn. 6 and p. 14, l. 35.

[7] 285 NLRB 573 (1987).

[8] 253 F.3d 714, 718 (D.C. Cir. 2001).

[9] Chairman Battista and Member Schaumber recognize that the *Dean General* presumption is the law of the case. However, they have substantial reservations as to whether the *Dean General* presumption should apply in "salting" situations. See dissenting opinion in *Ferguson Electric Co.*, 330 NLRB 514, 519 (2000).

Although Bittner's testimony linked Cobb's transfer policy to employee performance (i.e., having "a decent track record"), by unlawfully discriminating against the union applicants, Cobb deprived them of the opportunity to develop a "track record" with Cobb. Thus, under existing Board precedent, we must presume that if Cobb had hired the 13 union applicants, all 13 would have successfully performed their jobs, established positive "track records," and transferred to subsequent Cobb projects in accordance with Company policy on the completion of the Amarillo and Dalhart jobs.

IV. CONCLUSION

For the foregoing reasons, we reverse the Board's original finding that Cobb did not have a policy of refusing to hire plumbers as plumbers' helpers. However, we reaffirm the Board's prior finding that, absent the unlawful refusal to hire, the union applicants who would have been hired would have transferred to subsequent Cobb jobsites on the completion of the Amarillo and Dalhart projects.

ORDER

IT IS ORDERED that the proceeding is remanded to the Regional Director for Region 16 to prepare an amended compliance specification as indicated above.

Dated, Washington, D.C. May 26, 2004

Robert J. Battista, Chairman

Peter C. Schaumber, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

MEMBER WALSH, concurring in part and dissenting in part.

I join my colleagues in reaffirming the Board's prior finding that the Respondent failed to rebut the *Dean General* presumption that the discriminatees would have transferred to new projects on termination of the projects for which they were unlawfully denied hire. *Dean General Contractors*, 285 NLRB 573 (1987), approved in *Tualatin Electric, Inc. v. NLRB*, 253 F.3d 714, 718 (D.C. Cir. 2001); *McKenzie Engineering Co. v. NLRB*, 182 F.3d 622, 629 (8th Cir. 1999); and *Kentucky General, Inc. v. NLRB*, 177 F.3d 430, 439 (6th Cir. 1999).

However, I must dissent from my colleagues' opinion insofar as they reverse the Board's prior decision and find that the Respondent established the existence of a longstanding policy of not hiring plumbers to be plumbers' helpers. As discussed below, this finding rests on a misapplication of the relevant burdens of proof and established Board precedent.

DISCUSSION

It is well established that respondents in compliance proceedings before the Board bear the burden of establishing facts that would reduce the amount of backpay due. *United States Can Co.*, 328 NLRB 334, 337 (1999); *Minette Mills, Inc.*, 316 NLRB 1009, 1010 (1995). Thus, for the Respondent to prevail, it must show, "through a preponderance of [the] evidence" (*United States Can*, 328 NLRB at 337), that it had a policy against hiring plumbers as plumbers' helpers and that the policy would have resulted in the plumbers being hired *only* as plumbers and not as helpers. If any ambiguities or uncertainties exist in the record, they must be resolved against the Respondent and in favor of the discriminatees. *Minette Mills*, 316 NLRB at 1011.

The only evidence that the Respondent introduced to support its assertion that it had a longstanding policy was the testimony of its controller, Paula McKinney and its vice president of operations, Jerry Bitner. Their testimony, however, is entitled to little weight and therefore falls far short of establishing by a preponderance of evidence that such a policy, in fact, existed.

McKinney, who was not hired until well after the unfair labor practices had been committed, testified that she reviewed the personnel records of the Amarillo and Dalhart jobs and did not find any instance of a plumber being hired as a plumber's helper. McKinney did not testify that she reviewed any other records to ascertain whether the Respondent had maintained such a policy on other jobsites, nor did she testify to any specific knowledge of the plumbing trade that would allow her to differentiate between the duties of a plumber and a plumber's helper. She admitted that she was not involved in the hiring of plumbers or plumbers' helpers. She also admitted that she had not seen a written policy prohibiting the hiring of plumbers as plumbers' helpers.

Bitner testified that "to his knowledge" the Respondent did not hire plumbers as plumbers' helpers. Bitner admitted the policy was not in writing. Bitner also testified that he was rarely involved in hiring and that he was not involved in hiring for the Amarillo and Dalhart jobsites.

Project superintendent David Sandlin was the individual in charge of hiring plumbers and plumbers' helpers at the Amarillo and Dalhart jobsites. Yet the Respondent did not call Sandlin as a witness. Thus, we do not know if Sandlin was aware of or honored the alleged policy against hiring plumbers as plumbers' helpers.

In sum, the Respondent seeks to establish the existence of an unwritten hiring policy. It attempted to do so by the testimony of two witnesses who had no responsibility for hiring in general and had no responsibility for hiring for the Amarillo and Dalhart projects in particular. The

one individual responsible for the hiring on the projects in question was not called to testify. Under these circumstances, the Respondent has plainly failed to satisfy its burden of proof because the evidence it adduced is not probative of the fact it is attempting to establish. At best, the existence of the alleged policy is uncertain and, under well-established Board precedent, that uncertainty must be resolved against the Respondent as the wrongdoer. *Minnette Mills*, 316 NLRB at 1011.

Furthermore, there is compelling evidence "straight from the Respondent's mouth" that no such hiring policy existed. Specifically, the Respondent sent letters, dated August 15, 1996, to certain discriminatees, which read as follows:

> By this letter, Cobb Mechanical Contractors offers you reinstatement to either the position of Plumber or Plumber helper, depending on availability, to a Cobb jobsite in the state of Colorado. Please fill out the enclosed form and return it as soon as possible in the enclosed postage paid envelope.

The enclosed form stated:

> I, _____ [accept/decline] Reinstatement to the position of Plumber or Plumber helper, depending on availability, at a Cobb Mechanical Contractor's jobsite in the state of Colorado. I am available to report to work on _____. I can be reached to discuss job assignments at _____. My current mailing address is _____.

If the Respondent truly had a long-established policy of not hiring plumbers as plumbers' helpers, then one would reasonably expect this policy to be reflected in its offers of reinstatement and the forms provided for accepting or declining the offers. Instead, in clear violation of its alleged policy, the Respondent sent the discriminatees, who were plumbers, offers of "reinstatement *to either the position of Plumber or Plumber helper*." (Emphasis added.) How can these offers be reconciled with a "strict" and "longstanding" "policy" against hiring plumbers as plumbers' helpers?

The Respondent offers no answer whatsoever to this obvious question. My colleagues endeavor to fill the void: They state that the Respondent acted in derogation of its own "policy" because it was attempting to toll its backpay liability. This assertion suffers from a fatal flaw: It was never made by the Respondent itself, and arguments not made by the parties are not properly before the Board for consideration. See, e.g., *Avne Systems, Inc.*, 331 NLRB 1352, 1354 (2000) (argument not made by excepting party itself is not procedurally before the Board). And in any event, at the very least, if this was in fact the reason the Respondent sent these offers which were so obviously in derogation of its alleged longstanding policy, one would expect that the Respondent would have made this argument. Its silence on this point speaks volumes.

CONCLUSION

After carefully considering the record evidence as a whole in light of the arguments actually made by the parties themselves, the conclusion is inescapable that the Respondent did not have a policy against hiring plumbers for plumbers' helpers position. At the very least, the Respondent has failed to satisfy its burden of establishing, by a preponderance of the evidence, that it had such a policy.

Dated, Washington, D.C. May 26, 2004

Dennis P. Walsh, Member

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